

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rural Call Completion)	WC Docket No. 13-39
)	

COMMENTS OF THE VOICE ON THE NET COALITION

The Voice on the Net Coalition (“VON”)¹ hereby submits these comments in response to the issues raised in the Commission’s *Notice of Proposed Rulemaking* (“*NPRM*”) in the above-referenced matter.² VON opposes any mandate that Voice over Internet Protocol (“VoIP”) providers collect data or file reports with the Commission concerning their customers’ long distance calls made to rural telephone numbers. The Commission has not established statutory authority to impose the requirement on VoIP providers. The *NPRM* also fails to recognize that VoIP is not the same as traditional telephone service and provides unique challenges for compliance with the proposed ring signaling integrity requirement. Finally, recent Commission actions should prevent future rural call completion problems and give the Commission adequate recourse to address future rural call completion complaints without the need for a burdensome reporting and data collection effort or imposing a call signaling requirement that could inhibit technological innovation.

¹ The Voice on the Net Coalition works to advance regulatory policies that enable Americans to take advantage of the promise and potential of IP-enabled communications. See www.von.org for more information.

² In the Matter of Rural Call Completion, *Notice of Proposed Rulemaking*, WC Docket No. 13-39, FCC 13-18 (rel. Feb. 7, 2013); published in 78 Fed. Reg. 21891 (April 12, 2013).

BACKGROUND

The *NPRM* seeks comments on proposed rules that purport to address problems with the completion of long distance telephone calls to rural telephone company customers. Specifically, the Commission proposes that facilities-based originating long distance providers measure call answer rates for each rural operating company number to which 100 or more calls were attempted during the calendar month for certain categories of call attempts. *NPRM* ¶ 20. The information would be provided to the Commission once per calendar quarter. *Id.* Providers would be required to record information for each long distance call attempt they handle and retain these records for a period that includes the six most recent calendar months. *NPRM* ¶ 22. The reporting and record retention rules would apply to providers with more than 100,000 retail residential or business subscribers. *NPRM* ¶ 31. The Commission posits that to the extent the proposed rules would apply to interconnected VoIP providers, it proposes to exercise its ancillary authority to the extent that VoIP services are information services, on the grounds that such requirements would be necessary for the Commission to carry out its Section 201(b) and 202(a) obligations with respect to carriers. *NPRM* ¶¶ 19, 42.

DISCUSSION

I. The Commission Has Not Established Ancillary Authority to Impose the Proposed Requirements on VoIP Providers

The Commission suggests that call routing practices that lead to rural call termination and quality problems may be an unlawful practice under both Sections 201(b)

and 202(a). NPRM ¶ 19.³ The Commission proposes to exercise its ancillary authority to apply these proposed rules to VoIP providers, citing the need to carry out the Commission’s Section 201(b) and 202(a) obligations. This finding is misplaced.

For the Commission to have ancillary authority, there must be a specific statutory obligation imposed on the Commission, or specific statutory authority conferred upon the Commission, to which the proposed regulation is truly ancillary.⁴ Addressing the “ancillary to what?” question is critical, because “without reference to the provisions of the Act expressly granting regulatory authority, the Commission’s ancillary jurisdiction would be unbounded.”⁵ Thus, the Commission must be able to show that any exercise of its ancillary authority is “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”⁶ In this case, the Commission posits two specific statutory obligations to which it believes the regulations are ancillary. Those provisions, however, impose restrictions specifically on common carriers, and the *NPRM* fails, for each obligation, to specifically identify *how* imposition of the regulations on VoIP

³ 47 USC § 201(b) of the Act states that any practice or regulation of a common carrier that is unjust or unreasonable is declared to be unlawful. Section 202(a) states that any common carrier practice that unjustly or unreasonably discriminates would be unlawful.

⁴ See *Comcast Corp. v. FCC*, 600 F.3d 642, 654-61 (D.C. Cir. 2010). To be precise, “the FCC may invoke its ancillary jurisdiction only when (1) the Commission’s general jurisdictional grant under Title I of the Communications Act covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.” *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 998 (D.C. Cir. 2013) (internal quotations and alterations omitted). It is on the second prong where the *Second R&O*’s assertion of authority falls short.

⁵ *Comcast*, 600 F.3d at 655 (internal quotations and alterations omitted) (quoting *FCC v. Midwest Video Corp.*, 440 US 689, 706 (1979) (“Midwest Video II”).

⁶ *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

providers would actually enable it to enforce such restrictions specifically with respect to the common carriers over which the Commission has jurisdiction.⁷

Sections 201 and 202 of the Communications Act are the only Communications Act provisions the *NPRM* cites in justifying the Commission's purported authority to impose the new data collection, retention and reporting requirements on interconnected VoIP providers. Accordingly, the requirements are a valid exercise of the Commission's ancillary authority under the Communications Act only if the Commission can show that "its regulation of [this] activity over which it concededly has no express statutory authority ... is necessary to further its regulation of activities over which it does have express statutory authority" pursuant to the cited statutory provisions.⁸

It therefore is incumbent upon the Commission to make findings "link[ing] its exercise of ancillary authority to its Title II responsibilit[ies]."⁹ In other words, in this case, the Commission must be able to point to record evidence that limiting any new data collection to calls originated by facilities-based common carriers would be insufficient to evaluate common carriers' rural call completion. The *NPRM* does not contain such analysis. It does not demonstrate that calls originated by VoIP providers raise distinct completion problems, or that data on VoIP-originated calls

⁷ As mentioned above, the Commission also generally referenced its "various responsibilities under the Communications Act," but such a broad reference fails to meet the requirement of *NARUC II* that the Commission identify "*specifically delegated* powers under the Act" in order to exercise its ancillary jurisdiction. *Nat'l Ass'n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976)(emphasis added); *see also Midwest Video II* at 706 (Commission must provide "reference to the provisions of the Act *directly governing*" the subject to which the Commission asserts its proposed regulation is ancillary).

⁸ *See Comcast*, 600 F.3d at 654

⁹ *See Comcast*, 600 F.3d at 656.

is needed to obtain enough information for statistically significant results. Without evidence as to how data collected from interconnected VoIP providers is essential to effectuate the Commission's obligations with respect to common carriers, the Commission has no basis to assert ancillary jurisdiction to impose such requirements on interconnected VoIP providers.

II. VoIP is not a traditional service and should not be subject to rules meant for traditional services.

The Commission proposes a ring-signaling rule that would prohibit providers from sending an audible ring to the caller before the called party has been alerted. NPRM ¶ 41. The premise of the proposed ring-signaling rule is that it tracks "traditional industry practice . . . that has in the past proven effective" and, therefore, would not be "unduly burdensome" if imposed on carriers and VoIP providers. NPRM ¶ 41. But VoIP is not a "traditional" service. Instead of using POTS signaling and call set-up techniques, VoIP providers use protocols including the Session Initiation Protocol (SIP) and Jingle, which is an Extensible Messaging and Presence Protocol (XMPP) extension. There are multiple models for using those different protocols to exchange information before a session is accepted by the called user (a process known in the VoIP world as delivery of "early media"). The processes differ for VoIP calls than for POTS calls, and no single standard has been adopted industry-wide in the VoIP context.

Moreover, if any sort of ring-signaling rule were imposed on VoIP providers it could preclude enhanced functionalities that VoIP providers currently offer or will develop in the absence of a ring signaling rule. For example, VoIP providers often deliver incoming calls to multiple locations designated by the user. Vonage offers

features (including Call Hunt, Ring List and SimulRing) that allow users to have multiple phone lines ring either simultaneously or in a particular sequence when their Vonage phone number is dialed.¹⁰ Lingo will ring up to five phone lines simultaneously.¹¹ In that situation, when should ringing commence for the calling party? If multiple tones or announcements are received from the various terminating carriers, which one should be delivered? There are no industry-standard solutions nor is there any evidence of a problem with VoIP services that requires the creation of an industry-wide rule.

VoIP providers may also allow called parties to accept or reject an incoming call after listening to information about the call. In that case, it may be beneficial to continue the delivery of tones and announcements to the originating party after the called party has answered the call, until the called party has accepted or rejected the call based on the presented information. In other situations, such as when VoIP providers deliver call-cost information to the calling party, delaying delivery of tones and announcements to the caller may be appropriate.

Forcing VoIP providers to limit their end user services in order to conform to “traditional” call flows would be contrary to the Commission's settled deregulatory approach to VoIP. For nearly a decade the Commission has warned against “apply[ing] a regulatory paradigm that was previously developed for different types of services, which were provided over a vastly different type of network” and, in particular, against discouraging “innovative [VoIP] service offering[s] that ... promote[] consumer choice, technological development and the growth of the Internet, and universal service

¹⁰ See http://www.vonage.com/included-features/?refer_id=WEBFT0706010001W1&lid=main_nav_included_features

¹¹ See <http://www.lingo.com/voip/features/convenience.jsp#Simultaneous-Ring>.

objective.”¹² The Commission should not depart in this proceeding from its successful deregulatory path, particularly when there is no record of call-completion problems specific to VoIP services.

Moreover, although the Commission proposes to limit application of its new rules to “facilities-based” providers of long distance service, it inexplicably states that all interconnected VoIP providers, including over-the-top interconnected VoIP providers, are facilities-based. NPRM n. 39. There is no basis for such *ex ante* determination that all interconnected VoIP providers are facilities-based. Such a conclusion should be based on a proper application of the facts applicable to each provider to the definition established by the Commission for “facilities-based provider.” Indeed, most over-the-top interconnected VoIP providers rely on intermediate carriers as their means of getting calls to the PSTN, and it is those intermediate carriers who would have access to the “inaugural call detail information” sought by the Commission. NPRM ¶ 17. By defining all over-the-top providers as facilities based carriers, the Commission would create duplicative reporting obligations, and thus receive duplicative data, for those calls originated by customers of over-the-top interconnected VoIP providers.

III. New Rules Are Premature and Problems Can be Addressed Through Existing Rules and Policies

The Commission notes that rural completion problems appear in areas served by rate-of-return LECs, where terminating access rates are generally higher than in non-rural areas. NPRM ¶ 6. To minimize call termination rates, the NPRM suggests that long

¹² *Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3320 (2004).

distance providers are using intermediate providers that offer to deliver calls at comparatively low cost. The Commission further discusses how in the past two years it has issued decisions that reinforce prohibitions on call blocking, which should eliminate or reduce any rural call completion problems. NPRM ¶¶ 9-10.

VON notes that existing rules prohibit telecom carrier and VoIP providers from blocking, choking, reducing, or restricting traffic. The Commission has recently demonstrated its strong interest in pursuing enforcement action against companies it believes may be running afoul of these rules.¹³ Rather than requiring companies to implement new, costly and complex data collection, reporting and retention requirements, the Commission should give the industry an opportunity to self-regulate, backed by enforcement of existing rules.¹⁴

Telecom and VoIP providers are competing vigorously for end user customers. Ultimately the marketplace will require a high quality of service at reasonable rates. Imposing unnecessary regulatory costs with only speculative benefit is unnecessary at this time.

¹³ NPRM ¶ 11. See also, Consent Decree, File No. EB-12-IH-0087, DA 13-371, rel. Mar. 12, 2013 (wherein Level 3 Communications, LLC agreed to pay \$975,000 and implement a detailed compliance plan in order to terminate an FCC investigation related to Level 3's call completion practices to rural areas).

¹⁴ Moreover, as the Commission notes, the transition to a bill-and-keep methodology for intercarrier traffic, and the lowering of rural LEC termination rates during the transition period, will also provide an incentive for service providers to complete calls to rural areas. NPRM ¶ 37.

CONCLUSION

The VON Coalition questions the need for the proposed data collection, retention and reporting requirements, as well as the ring signaling integrity rule. To the extent otherwise adopted, the new rules should not be applied to VoIP providers for the reasons described herein.

Respectfully submitted,

VOICE ON THE NET COALITION

/s/

Glenn S. Richards
Executive Director
2300 N Street NW
Washington D.C. 20037
glenn.richards@pillsburylaw.com
(202) 663-8215

May 13, 2013